STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 25, 2014
v	No. 309114 Oakland Circuit Court
THOMAS JAMES LUNDY, Defendant-Appellant.	LC No. 2010-233240-FC

Before: MURPHY, C.J., and M.J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) and one count of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 47 to 75 years' imprisonment for each conviction. Defendant appeals as of right. We affirm his convictions but remand for resentencing.

This case arises out of an horrific sexual assault against a 16-year-old girl after she had gone to bed while visiting at her sister's townhouse. Defendant first claims that the trial court violated his Sixth Amendment right to confront the witnesses against him by admitting evidence regarding his buccal (cheek) swab associated with DNA testing. Defendant's saliva sample was taken by the police after the granting of a motion to compel production of a sample. Defendant had objected to giving the sample, although he did not object at trial to the testimony of the forensic scientist, who stated that she forwarded a "known buccal swab sample" from defendant, along with the victim's samples, to the Michigan State Police Crime Lab for DNA analysis. A forensic scientist from the crime lab then testified to comparing the samples and finding a DNA match. Defendant contends that a Confrontation Clause violation occurred because the person who took the swab sample from defendant was not offered for cross-examination.

Concerning the proper standard of review, the parties correctly posit that the plain-error test set forth in *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), governs. The *Carines* Court held "that the plain error rule . . . extends to unpreserved claims of constitutional error." *Id.* at 764. In explaining the plain-error test, the Court stated:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally

> requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence. [*Id.* at 763 (citations, internal quotation marks, and alteration brackets omitted).]

Assuming a Confrontation Clause violation, defendant has failed to establish the requisite prejudice. Moreover, the *presumed* plain, forfeited error did not result in the conviction of an actually innocent person, nor did it seriously affect the fairness, integrity, or public reputation of the proceedings.

Aside from the DNA evidence that linked defendant to the offenses, other evidence of his identity as the perpetrator was ample, including testimony of the victim, her mother, and several neighbors, one of whom had known defendant since elementary school. Additionally, defendant made incriminating statements to these witnesses and his car had been at the crime scene, leaving no doubt of his identity or his guilt. Moreover, defendant's defense at trial was not an alibi defense; he did not claim a lack of presence at the house, nor did he assert that he did not have sexual intercourse with the victim. Rather, defendant's stance at trial suggested that he entered the house with permission, or at least his entry was not objected to, and then engaged in consensual sexual intercourse. Defendant attacked the evidence against him as failing to show that an actual home invasion and rape took place. Accordingly, the DNA evidence added little to the prosecution's case.[1]

Next, defendant argues that he is entitled to resentencing under state and federal due process requirements, because error in scoring offense variable 10 (OV 10), MCL 777.40, and OV 19, MCL 777.49, resulted in a higher sentencing guidelines range. Defendant also argues that trial counsel was ineffective in failing to object to the scoring of OV 10.

Interpretation and application of the sentencing guidelines are legal questions, reviewed de novo. *People v Huston*, 489 Mich 451, 457; 802 NW2d 261 (2011). The lower court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Whether the facts, as found, are adequate to satisfy a particular score is a question of statutory interpretation, reviewed de novo. *Id*.

We first address defendant's claim of error on the scoring of OV 10. MCL 777.40(1)(b) provides that a score of ten points is appropriate for OV 10 where defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or

[1] Defendant does not contend that the DNA evidence was the reason or sole reason that the particular defense was chosen.

the offender abused his or her authority status." Five points is to be scored if the victim was "asleep" or other conditions were met. MCL 777.40(1)(c). The prosecution concedes error and agrees with defendant that five points should have been scored for OV 10. Given the concession, we remand for resentencing, as the change in scoring alters the minimum guidelines range from 171 to 570 months to 135 to 450 months. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Phelps*, 288 Mich App 123, 136; 791 NW2d 732 (2010).

With respect to OV 19, it is to be scored at 15 points if the offender "used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." MCL 777.49(b).

The trial court properly scored 15 points for OV 19. Defendant did use force against another person or her property and interfered with the administration of justice or the rendering of emergency services by kicking a witness's cell phone out of her hand when she was trying to photograph defendant's license plate to give to police. Defendant also removed the license plate from his car. These acts, especially kicking the cell phone, satisfied the requirements of scoring 15 points for OV 19, or at least ten points for "otherwise interfere[ing] with or attempt[ing] to interfere with the administration of justice," MCL 777.49(c).[2]

Finally, defendant argues that judicial fact-finding at sentencing based on less than proof beyond a reasonable doubt violated his Fifth and Sixth Amendment rights. We disagree. In *Alleyne v United States*, 570 US ___; 133 S Ct 2151, 2163; 186 L Ed 2d 314 (2013), the United States Supreme Court held that facts that increase a mandatory minimum sentence must "be submitted to the jury and found beyond a reasonable doubt." However, in *People v Herron*, ___ Mich App ___; ___ NW2d ___, issued December 12, 2013 (Docket No. 309320), slip op at 7, this Court rejected application of *Alleyne* to Michigan's sentencing scheme:

> In essence then, defendant's . . . argument is reduced to reliance on *Alleyne* alone. We conclude that defendant's argument fails in light of the pains the Supreme Court took in Part III–C of its opinion to distinguish judicial fact-finding to establish a mandatory minimum floor of a sentencing range from the traditional wide discretion accorded judges to establish a minimum sentence within a range authorized by law as determined by a jury verdict or a defendant's plea. We hold that judicial fact-finding to score Michigan's guidelines falls within the wide discretion accorded a sentencing judge in the sources and types of evidence used to assist . . . [a court] in determining the kind and extent of punishment to be imposed within limits fixed by law. Michigan's sentencing guidelines are within the broad sentencing discretion, informed by judicial factfinding, . . . [that] does not violate the Sixth Amendment. [Citations and internal quotation marks omitted.]

[2] The five point difference would not further alter the minimum sentence range.

Defendant's convictions are affirmed but we remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause